IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26/04/2004

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THE HONOURABLE MR.JUSTICE M. CHOCKALINGAM

SECOND APPEAL NO.1309 OF 1993

Ramaswamy Gounder .. Appellant

-Vs-

Nanjappa Gounder .. Respondent

This second appeal is preferred under Section 100 of CPC against the judgment and decree dated 20.8.1993 made in AS No.13 of 1993 on the file of the learned Subordinate Judge, Tiruppur confirming the judgment and decree dated 14.12.1992 made in OS No.218 of 1990 on the file of the learned District Munsif, Tiruppur.

!For Appellant : Mr.K.Ramachandran

^For Respondent : Mr.K.Govi Ganesan

:JUDGMENT

The defendant whose plea in a suit for declaration of title in respect of the immovable property set out in the plaint and consequential permanent injunction on rejection of the same by both the courts below have brought forth this second appeal.

2. The short facts are noticed in the pleadings of the parties:

The suit properties are originally belonged to one Ammasaiakkal, wife of Ramasamy Gounder of Edayapalayam village. The said Ammasaiakkal is the only daughter of Palanakkal and Pongia Gounder. The said Ammasaiakkal's mother Palanakkal was in possession and enjoyment of the properties till her death. She died about 20 years back. After her death, Ammasaiakkal has inherited the properties. The patta for the suit properties stands in the name of Ammasaiakkal and she is paying kist to the suit properties. On 5.2.1990 the plaintiff has purchased the properties from the said Ammasaiakkal under a registered sale deed. The defendant is owning lands on the North of the suit properties and the East West fence divides the suit property and the defendant's lands. The defendant had made an illegal attempt to prevent the plaintiff's enjoyment of the suit property and threatened the plaintiff that he should sell the lands to him. Hence, the plaintiff has filed the suit.

3. The suit was resisted by the defendant by stating that Pongia Gounder had three wives, namely, Ramakkal, Palanakkal and Karuppayal and each wife had one daughter. Ammasaiakkal is the daughter of Palanakkal. Ramakkal

had a daughter by name Marakkal. Karuppayal had a daughter, by name Ramakkal. Pongia Gounder died long back and his properties devolved upon the three daughters and each having 1/3rd right. It is not correct to state that the properties had belonged to Ammasaiakkal alone. The plaintiff had purchased Ammasaiakkal's share and later the defendant had purchased the 1/3rd share of Ramakkal from her sons and daughters by a sale deed dated 7.3.1990. Hence, the defendant is entitled to 1/3rd share in the suit properties, and the suit was to be dismissed.

4. The trial court framed necessary issues, tried the suit and decreed the same. Aggrieved, the defendant took it on appeal. It was dismissed by the first appellate court. Hence, the defendant has brought forth this second appeal.

5. At the time of admission, the following substantial questions of law were formulated by this Court for consideration:

1) Whether the courts below have erred in not rejecting the suit on the ground that whereas the plaint is on the basis that Amasikkal was the only daughter of Ponga Gounder and Palaniakkal while it actually transpired that the deceased Pongia Gounder had two other wives and the defendant and the defendant purchased the property from one of the daughter of Pongia Gounder?

2) Whether the courts below ought to have dismissed the suit as not maintainable on the ground that the proper frame of the suit should be one for partition and not for absolute declaration?

3) Whether the courts below were in error in tracing title to Palaniakkal the mother of Amasaiakkal the Vendor of the plaintiff on grounds not pleaded in the plaint?

4) Whether the court below is error or erred in rejecting the defendant's title?

6. Heard the learned counsel for the appellant and the learned counsel for the respondent.

7. After careful consideration of the rival submissions and scrutiny of the materials available, this Court is of the considered view that the appeal carries no merit. The respondent/plaintiff, who sought the above reliefs, came with a specific case that the property originally belonged to one Ammasaiakkal, the wife of Ramasamy Gounder; that the said Ammasaiakkal was the only daughter of Palanakkal and Pongia Gounder; that the said Ammasaiakkal's mother Palanakkal was in possession and enjoyment of the properties till her dead; that on her death, the properties were inherited by her only heir; that she was in exclusive possession and enjoyment of the same; that she was paying kist; that she sold the property to the plaintiff on 5.2.1990 under a registered sale deed; that the East West fence divides the suit property and the defendant's lands; that while so the defendant was making unlawful attempt to prevent the plaintiff's enjoyment of the suit property, and hence, the suit was filed.

8. The suit was resisted by the defendant stating that the said Pongia Gounder had three wives, namely, Rammakkal, Palanakkal and Karuppayal; that each wife had one daughter; that Ammasaiakkal was the daughter of Palanakkal, likewise, Ramakkal had a daughter by name Marakkal and Karuppayal had a daughter by name Ramakkal; that Pongia Gounder died long back and his properties devolved upon the three daughters and each entitled to 1/3rd right, and hence, it would be futile to contend on the part of the plaintiff that the property was belonged to Ammasaiakkal as the sole heir; that even the

plaintiff's sale deed is valid only to an extent of 1/3rd share, which belonged to Ammasaiakkal; that the defendant was entitled to 1/3rd share by way of purchase from the other co-sharer, and under the stated circumstances, no question of declaration would arise in favour of the plaintiff.

9. Both the courts below, in view of the evidence available, have recorded a finding that the plaintiff was entitled to the property pursuant to the sale deed executed by Ammasaiakkal in his favour and the consequential permanent injunction also. It is not in dispute that the property originally belonged to the husband of Palanakkal. According to the plaintiff, he purchased the property from Ammasaiakkal, who was the only daughter of Palanakkal. The said Palanakkal, who was the full-fledged owner of the property, inherited the same after the death of her husband.

10. What are all contended by the learned counsel for the appellant before this Court is that the original owner had three wives and each wife had one daughter, and thus, each was entitled to 1/3rd share. Even assuming the plaintiff's sale deed is valid, it could be only to an extent of 1/3rd share. The defendant has also purchased 1/3rd share. Hence, declaration could not be granted as asked for. Pointing to the evidence adduced by the plaintiff's side before the lower court that the property though claimed inherited by Palanakkal as the sole heir of her husband, it is contended by the appellant that the evidence was adduced in such a way that the property was given in the year 1 919 for her maintenance and subsequently, by operation of law, it was enlarged under the Hindu Succession Act, 1956, and thus, she became the full-fledged owner, but there was no pleading to that effect. This Court is unable to countenance the said contention.

11. The plaintiff has clearly averred that the property originally belonged to the husband of Palanakkal and she became entitled to the property on the death of her husband and it was further devolved upon her only daughter. It is true that it was not averred in the plaint that the property was originally given to Palanakkal for her maintenance and subsequently, it was enlarged by operation of law under Hindu Succession Act, 1956. Further, it is to be pointed out that it has been clearly averred in the plaint that she inherited the property from her husband and after the death of her husband, she was the fullfledged owner of the property and then it came to the hands of her only daughter. Under the stated circumstances, the non mentioning of the fact that the property was given to Palanakkal by way of maintenance and subsequently, it was enlarged would not in any way affect the case of the plaintiff for the reason that according to the plaintiff, Palanakkal inherited the property from her husband and after his death, she was the full-fledged owner. It is to be further pointed out that she was not the vendor of the document. The plaintiff has purchased the property from the only heir of Palanakkal, namely, Ammassaiakkal, who was the heir of Palanakkal. Hence, the defendant cannot be allowed to take advantage of the non mentioning of the fact, which is immaterial to be mentioned therein. Hence, this Court is unable to notice any substance in the plea now put forth by the appellant. This court is unable to notice any reason to interfere with the judgment of both the courts below. The judgments of both the courts below have got to be affirmed.

12. In the result, this second appeal fails and the same is dismissed, leaving the parties to bear their costs.

Index : Yes
Internet : Yes

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To

1. The Subordinate Judge, Tiruppur
2. The District Munsif, Tiruppur